



Nchogu, Omwanza & Nyasimi Advocates v Ogle Construction Company Limited (Miscellaneous Cause E094 of 2021) [2022] KEHC 253 (KLR) (Commercial and Tax) (25 March 2022) (Ruling)

Neutral citation: [2022] KEHC 253 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CAUSE E094 OF 2021**

A MSHILA, J

MARCH 25, 2022

BETWEEN

NCHOGU, OMWANZA & NYASIMI ADVOCATES APPLICANT

AND

OGLE CONSTRUCTION COMPANY LIMITED RESPONDENT

RULING

INTRODUCTION

1. The Applicant filed a Chamber Summons dated 17th June 2021 pursuant to paragraph 11(4) of the Advocates (Remuneration) Order and Articles 50 and 159 of the *Constitution of Kenya*. The Application is supported by the grounds on its face and by the supporting affidavit sworn on even date by NASSANGA SOPHIE and sought orders that;
 - a. The Court enlarges time within which to file a reference against the decision of the Taxing Officer delivered on 11th May 2021.
 - b. The draft reference attached therewith be deemed as properly filed subject to payment of the requisite court fees.

THE APPLICANTS CASE

2. The Applicant submitted that it wrote two letters one dated 12th May 2021 and another reminder letter dated 28th May 2021 to the Deputy Registrar and which letters are marked as N.S.4 and N.S 5 in the supporting affidavit of the Applicant's application and in those letters, the Applicant clearly stated that it needed to be supplied with the certified copies of the ruling containing the reasons as soon as the decision was delivered to enable it file a Reference.



3. The above mentioned letters amounted to a Notice of Objection as envisaged under Rule 11(1) of the Advocates Remuneration Order.
4. On whether the court may extend the time for filing of a reference under the Advocates Remuneration Order in the circumstances of the case, the Applicant submitted that this is largely a question of law and the Court is clothed with wider powers, unfettered discretion and jurisdiction to grant the orders sought to a deserving party on the consideration of justice and fairness.
5. It was the Applicant's submission that it had duly given the reasons for delay in filing the reference as being the delay by the Deputy Registrar in furnishing the certified copy of ruling with the reasons for Taxation in time to the Applicants to enable them to file the reference.
6. In addition, the Applicant sought for the reasons on the day the ruling was delivered that is the 11th May 2021 and Counsel for the Applicant but the Taxing Officer informed the parties that the ruling containing the reasons for the taxation was not ready as it had not yet been typed and that the same would be available when ready.
7. The Applicant's Counsel followed up with a letter dated 12th May 2021 but there was no response from the Deputy Registrar prompting the Applicant's Counsel to write another reminder letter dated 28th May 2021 seeking for the typed copies of the ruling to file a reference and there was no response. The Applicant was only able to obtain the certified copies of the ruling/decision with the reasons for taxation of the Advocate-Client bill of costs on the 11th June 2021 when the time had lapsed for filing the reference. The ruling is dated 10th June 2021 albeit having been read virtually on 11th May 2021.
8. The Applicant relied on the case of *Hamilton Harrison & Mathews v Mumbi Ngengi [2020] eKLR*, on the issue of extension of time to file a reference.
9. In light of the above circumstances, the Applicant was unable to file the reference on time.

RESPONDENT'S CASE

10. The Respondent submitted that no Notice was given under Rule 11 (1) of the *Advocates (Remuneration Order) Rules* within 14 days of the Ruling. No such Notice was given yet Rule 11 (1) is clear that the Notice was to state the items the advocate would be objecting to.
11. The letters dated 12th May 2021 and 28th May 2021 do not constitute a Notice in terms of Rule 11 (1) as they do not state the items the Advocates were objecting to. The so-called notices were incomplete and a notice which does not follow the law or comply with Rule 11 (1) cannot be said to be a proper notice.
12. The second issue for determination is if the court can enlarge time to file the Reference. The answer is yes as the court's jurisdiction and discretion to do so are unfettered. However, the law is quite clear that the discretion to extend time is available only to a deserving Applicant. An applicant must place before the court circumstances that enables the court to extend time in his favour, otherwise the discretion will not be exercised in the Applicant's favour.
13. This was held by the Court of Appeal in *Leo Sila Mutisa v. Rose Hellen Wangari (1999) 2 EA 231*. The court further held that it would consider the following when exercising its discretion:
 - a) Length of time.
 - b) Reasons for delay.
 - c) Chances of success.
 - d) Degree of prejudice to Respondent.



- e) Discretion must be exercised judicially and not arbitrarily or capriciously nor should it be exercised on the basis of sentiment or sympathy.
14. It was the Respondent's submission that the Applicant is not deserving of the court's discretion as it did not comply with Rule 11 (1). Having failed to do so, if the court was to enlarge time, such discretion would be prejudicial to the Respondent and it would be arbitrarily.

ISSUES FOR DETERMINATION

15. After consider the Application, the Response and the written submissions by the respective parties, the issues for determination are;
- a. Whether the Applicant has satisfied the requirements for the enlargement of time;
 - b. Whether the Applicant issued Notices as required under Rule 11 (1) of the Advocates (Remuneration Order) Rules;
 - c. Whether the draft reference should be deemed as properly filed;

ANALYSIS

Whether the Applicant has satisfied the requirements for the enlargement of time;

16. The filing of the Application to enlarge time by the Applicant was made to this Court on 17th June 2021. In so far as the Advocates Remuneration Order is concerned in paragraph 11 an appeal against the decision of the Deputy Registrar shall be a matter to be lodged within 14 days from the date of the order or certificate of costs.
17. The applicable law is found at Paragraph 11 (1) and (4) of the Advocates Remuneration Order stipulates as follows: -
- “(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects,
- (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.”
18. The discretion to extend time was addressed in the case of *Salat versus Independent Electoral & Boundaries Commission & 7 others* [2014] eKLR where the Court stated that:
- “Discretion to extend time is indeed unfettered but it's incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there were extenuating circumstances that could enable the Court to exercise discretion in favour of the applicant. In doing so the following principles are applicable thus:
- (i) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party.
 - (ii) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court.



- (iii) Whether the Court ought to exercise discretion to extend time, is a consideration to be made on a case to case basis.
- (iv) Whether there is a reasonable reason for the delay, which ought to be explained to the satisfaction of the Court.
- (v) Whether there would be any prejudice suffered, the respondent if the extension was granted.
- (vi) Whether, the application had been brought without undue delay and
- (vii) Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.”

19. In *Nyakundi & Company Advocates –Vs- Kenyatta National Hospital Board [2005]eKLR* the Court held that:-

“Under Rule 11 (2) of the Advocates (Remuneration) Order quoted above, a definite time frame for filing a reference is given. It is fourteen (14) days from the receipt of the reasons. If an Objector is delayed in making his/her reference he/she may apply for enlargement of time to make the reference under Rule 11(4) of the same Order.”

- 20. In this instance, it did not happen, in a manner prescribed under paragraph 11 of the Advocates Remuneration Order to bring the intended appeal/reference within the prescribed period by the rules. The filing of the chamber summons is intended to achieve enlargement of time to file a reference and for the applicant to exercise his right of appeal against the decision handed down by the Deputy Registrar on 11th May 2021.
- 21. The Applicant attributed the delay to the unavailability of a copy of the typed Ruling of the Taxing Officer’s ruling and were only able to obtain the ruling with the reasons for taxation on the 11th June 2021 when the time had lapsed for filing the reference.
- 22. It is the Court’s view that this was a matter not within the control of the Applicant and thus the delay in filing the reference is justified. Further, the Applicant took steps to ensure that it followed up on the Ruling by writing the two mentioned letters to the Deputy Registrar inquiring about the Certified copy of the Ruling.
- 23. From the above material placed before this court it is manifestly clear that this is a suitable case for this court to exercise its discretion to grant an extension of time for the filing of the reference

Whether the Applicant issued Notices as required under Rule 11 (1) of the Advocates (Remuneration Order) Rules;

- 24. It was the Applicant’s argument that the two letters one dated 12th May 2021 and another reminder letter dated 28th May 2021 to the Deputy Registrar requiring to be supplied with the ruling with the reasons for the Taxation to enable it file a Reference amounted to a Notice of Objection as envisaged under Rule 11(1) of the Advocates Remuneration Order.
- 25. In the case of *Muriu Mungai & Co. Advocates Vs New Kenya Co-operative Creameries Ltd*, HCCC 692 of 2007 the court was of the view that: -

“It is mandatory for an Applicant who objects to the taxation to annex the ruling, giving reasons by the taxing master supporting the taxation....Nowhere, is it provided that if there



be a delay in the taxing master giving reasons for the taxation or if a party applies for particulars outside the period of the 14 days provided under Rule 11(1), and the reasons are not given within the prescribed period, a party is at liberty to proceed and file a reference without the reasons.”

26. The said letters were written to the effect that the Applicant could not proceed to file a reference without the reasons given in the Ruling. Now that the Applicant is in possession of the Ruling and the reasons for the delay having been now given, for the expeditious filing of the reference the Letters in issue are found to suffice as the Applicant’s objection to the Taxing Officer’s Ruling.

Whether the draft reference should be deemed as properly filed

27. In view of the foregoing and the reasons given in this application, the Court is persuaded that there is merit granting leave to extend time for filing of the reference. The Respondent will not suffer prejudice as an award of costs will suffice while on the other hand the Applicant gets an opportunity to ventilate its grievance against the taxation.
28. The draft reference shall only be deemed as filed upon payment of the requisite court filing fees and service within the window granted for extension of time.

FINDINGS AND DETERMINATION

29. In the light of the foregoing this court makes the following findings and determinations;
- (i) This court finds that this is a suitable case in which to exercise its discretion to extend the time in which to file the reference;
 - (ii) The application is found to have merit and it is hereby allowed;
 - (iii) The Applicant to pay filing fees and serve the reference within thirty (30) days from the date hereof;
 - (iv) Each party to bear its/their costs of this application.

Orders Accordingly.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 25TH DAY OF MARCH, 2022.

HON. A. MSHILA

JUDGE

In the presence of;

Mwangi for the Client/Respondent

Masika for the Client/Applicants

Lucy-----Court Assistant

